Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

STATE OF LOUISIANA,
Petitioner,

versus

QUINCY BROWN,
Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the enhancement of an adult sentence with the use of a juvenile adjudication in which the juvenile was not provided the right to a jury trial denies the defendant's right not to be deprived of liberty without due process of law?

PARTIES TO THE PROCEEDINGS

1. State of Louisiana, through Orleans Parish District Attorney, Eddie J. Jordan, Jr. and Assistant District Attorney, Donna Rau Andrieu, Plaintiff – petitioner.

2. Quincy Brown, Defendant-respondent.

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OPINIONS BELOW

On May 10, 1999, the State of Louisiana charged Quincy Brown by bill of information with two counts of attempted first-degree murder (La. Rev. Stat. 14:27(30)), one count of armed robbery (La. Rev. Stat. 14:64), and one count of simple robbery (La. Rev. Stat. 14:65) under Orleans Parish Criminal District Court Case No. 406-890. The State of Louisiana later entered a *nolle prosse* as to one of the attempted murders. Brown pleaded guilty to the simple robbery count and proceeded to trial on the armed robbery charge and the remaining attempted first-degree murder charge. On October 3, 2001, the jury acquitted Brown of attempted first-degree murder and convicted him of armed robbery. The trial court sentenced Brown to serve ninety-nine years at hard labor without benefit of parole, probation or suspension of sentence for the armed robbery conviction, the maximum sentence under La. Rev. Stat. 14:64, and to seven years at hard labor with benefits for the simple robbery conviction. The sentences were ordered to run concurrently with credit for time served.

The State then filed a multiple offender bill of information, charging Brown as a habitual offender pursuant to La. Rev. Stat. 15:529.1. The predicate conviction upon which the multiple bill of information was based was a juvenile adjudication for attempted second-degree murder. Defense counsel filed a motion to exclude evidence of the prior adjudication, arguing that the use of Brown's juvenile adjudication for purposes of enhancing his sentence under La. Rev. Stat. 15:529.1 is unconstitutional. Brown urged that the use of the adjudication to enhance his sentence violated this Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) because in his juvenile delinquency proceeding he was not afforded

the right to a jury trial. The trial court denied the motion and found Brown a second felony offender. Brown's sentences were vacated and he was re-sentenced to one hundred ninety-eight years at hard labor without benefit of parole for the armed robbery conviction and to a concurrent term of fourteen years for the simple robbery conviction. Brown appealed his sentence as excessive and unconstitutional under *Apprendi*.

On May 28, 2003, the Louisiana Fourth Circuit Court of Appeal affirmed Brown's conviction, but reversed his sentence as violative of *Apprendi*. See, *State v. Brown*, 853 So. 2d 8, 2002-1217 (La. App. 4 Cir. 5/28/03). The State's application for rehearing was denied on September 9, 2003. On July 6, 2004, the Supreme Court of Louisiana affirmed Brown's sentence, holding the use of juvenile adjudications as predicate offenses under La. Rev. Stat. 15:529.1 as violative of *Apprendi*. See, *State v. Brown*, 879 So. 2d 1276, *reh'g denied*, 2003-2788 (La. 7/6/04). On September 3, 2004, the State's application for rehearing was denied.

STATEMENT OF JURISDICTION

The judgment upon which the State of Louisiana seeks review was entered on July 6, 2004 by the Supreme Court of Louisiana. The State's application for rehearing was denied on September 3, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257.

RELEVANT CONSTITUTIONAL PROVISIONS

1.) AMENDMENT V of the U.S. Constitution
2.) AMENDMENT VI of the U.S. Constitution

3.) AMENDMENT VIII of the U.S. Constitution
4.) AMENDMENT XIV of the U.S. Constitution

STATEMENT OF THE CASE

On May 10, 1999, Quincy Brown was charged by bill of information with two counts of attempted first-degree murder (La. Rev. Stat. 14:27(30)), one count of armed robbery (La. Rev. Stat. 14:64), and one count of simple robbery (La. Rev. Stat. 14:65). The State later entered a *nolle prosequi* as to one of the attempted first degree murder counts. Brown pleaded guilty to the simple robbery count and proceeded to trial on the armed robbery charge and the remaining attempted first-degree murder charge. The jury acquitted Brown of attempted first-degree murder and convicted him of armed robbery. The trial court sentenced Brown to serve ninety-nine years at hard labor without benefit of parole, probation or suspension of sentence for the armed robbery conviction, the maximum sentence under La. Rev. Stat. 14:64, and to seven years at hard labor with benefits for the simple robbery conviction. The sentences were ordered to run concurrently with credit for time served.

The State then filed a multiple offender bill of information, charging Brown as a habitual offender pursuant to La. Rev. Stat. 15:529.1. The pertinent language of the statute provides:

> A. (1) Any person who, having been convicted within this state of a felony or adjudicated a delinquent under Title VIII of the Louisiana's Children's Code for the commission of a felony-grade violation of either the Louisiana Controlled Dangerous

> Substances Law involving the manufacture, distribution, or possession with intent to distribute a controlled dangerous substance or a crime of violence as listed in Paragraph (2)[1] of this Subsection, or who, after having been convicted under the laws of any other state or of the United States, or any foreign government of a crime which, if committed in this state would be a felony, thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
>
> (a) If the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction;

The predicate conviction upon which the multiple bill was based was a juvenile adjudication for attempted second-degree murder. Defense counsel filed a motion to exclude evidence of the prior adjudication, arguing that the use of Brown's juvenile adjudication for purposes of enhancing his sentence under La. Rev. Stat. 15:529.1 is unconstitutional. Brown urged that the use of the adjudication to enhance his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466, 120

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[1] Paragraph 2 lists the following crimes: attempted first-degree murder; attempted second-degree murder; manslaughter; armed robbery; forcible rape, simple rape, second-degree kidnapping; a second or subsequent aggravated battery; a second or subsequent aggravated burglary; and a second or subsequent offense of burglary of an inhabited dwelling.

S. Ct. 2348, 147 L. Ed. 2d 435 (2000) because in his juvenile delinquency proceeding he was not afforded the right to a jury trial. The trial court denied the motion and found Brown a second felony offender and sentenced him to one hundred ninety-eight years at hard labor without benefit of parole for the armed robbery conviction and a concurrent term of fourteen years for the simple robbery conviction. Brown appealed his sentence as excessive and unconstitutional under *Apprendi*.

The Louisiana Fourth Circuit Court of Appeal affirmed Brown's conviction, but reversed his sentence as violative of *Apprendi*. The State's application for rehearing was denied. The Supreme Court of Louisiana affirmed Brown's sentence, and held that the use of juvenile adjudications obtained without the right to a jury trial as predicate offenses under La. Rev. Stat. 15:529.1 is violative of *Apprendi*. The State's application for rehearing was denied.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The Supreme Court of Louisiana erred when it ruled that Quincy Brown's sentence for armed robbery, which was enhanced beyond the statutory maximum under a provision of Louisiana's habitual offender statute allowing for sentence enhancement based on prior juvenile adjudications of certain enumerated violent crimes, violated Brown's due process rights because he was not afforded a right to trial in his juvenile proceeding. In so ruling, the Supreme Court of Louisiana erroneously found that the use of juvenile adjudications as predicate crimes for purposes of sentence enhancement do not fall under the pronouncement by this

Court in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) which exempts "prior convictions" from the general rule that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

The crucial determination under *Apprendi* is whether the fact used to enhance the sentence is an element of the offense or a sentencing factor. In *Apprendi*, the defendant fired several shots into the home of an African-American family that had recently moved into a previously all-white neighborhood. A New Jersey grand jury returned a 23-count indictment charging the defendant with several offenses; however, none of the counts referred to New Jersey's hate crime statute, and none alleged that he acted with a racially biased purpose. *Apprendi, supra,* 530 U.S. at 469. The defendant eventually pled guilty to three counts, and his sentence was enhanced under New Jersey's hate crimes statute on the ground that he committed the offense with a "biased purpose." *Id.* at 469-470. The judge subsequently concluded that the crime was motivated by racial bias, and he doubled the original sentence. *Id.* at 471.

This Court struck down New Jersey's hate crime statute, which authorized a judge to increase a defendant's maximum sentence if the judge found, by a preponderance of the evidence, that in committing the crime, the defendant acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity. In doing so, this Court distinguished an element of a greater offense from a sentencing factor and acknowledged that a criminal defendant is "indisputably" entitled to a "jury determination that [he] is guilty of every element of the crime with which

he is charged, beyond a reasonable doubt. *Id.*. at 477 quoting *United States v. Gaudin*, 515 U.S. 506, 510, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995). This Court held that racial bias is an element of the offense that need be charged in the indictment and proved beyond a reasonable doubt to a jury, and that the sentence enhancement violated Apprendi's right to a jury determination of whether he was guilty beyond a reasonable doubt of every element of the crime with which he was charged. *Id.* at 477.

Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), likewise, turned on whether the fact upon which the enhancement was based was an element of a greater offense or a sentencing factor. In *Ring*, the jury found the defendant guilty of felony murder occurring during perpetration of an armed robbery. *Ring*, 536 U.S. at 592. Under Arizona law, the defendant was exposed to an enhanced penalty if, at a separate sentencing hearing, further findings of statutorily enumerated "aggravating circumstances" and any "mitigating circumstances" were found by a judge. *Id.* at 592-593. The death sentence could be imposed only if the judge found at least one aggravating circumstance and no substantial mitigating circumstances to warrant leniency. *Id.* at 593. At Ring's sentencing hearing, the judge found two aggravating factors, including a finding that the offense was committed for pecuniary gain, and one mitigating factor, Ring's minimal criminal history. The judge found that the latter did not warrant leniency. *Id.* at 595. On appeal, Ring argued an *Apprendi* violation and this Court held that the findings of aggravating and mitigating factors were findings of fact related to the commission of the offense for which Ring was entitled to a jury determination. *Id.* at 608.

Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999), which preceded the *Apprendi* ruling by a year, also turned on the "determination that a fact is an element of an offense rather than a sentencing consideration." *Jones v. United States*, 526 U.S. at 232 . In *Jones*, the defendant was charged with violating the federal carjacking statute, 18 U.S.C. 2119, which provides that a person possessing a firearm who takes a motor vehicle from the person or presence of another by force or intimidation shall: (1) be imprisoned not more than fifteen years; (2) if serious bodily injury results be imprisoned not more than twenty-five years; and (3) if death results be imprisoned for any number of years up to life. *Id.* at 230. The indictment made no reference to the numbered subsections and charged none of the facts mentioned in the subsections. *Id.* A jury convicted Jones of the charged offense and the trial judge, after determining that one of the victims suffered serious bodily injury, imposed a twenty-five year sentence. Jones objected and argued that serious bodily injury was an element of the offense that had not been pleaded in the indictment or proved to the jury. The court denied the objection. This Court framed the issue as one of statutory interpretation: "Much turns on whether the federal carjacking statute . . . defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict. *Id.* at 232. After analyzing the statute and comparing it to others in which "serious bodily injury" was "unmistakably identified" as an offense element, this Court concluded that the fairest reading of the statute "treats the fact of serious bodily harm as an element, not a mere sentence enhancement. *Id.* at 239.

In this case, it is not an element of Brown's offense that is at issue, but a juvenile adjudication -- a sentencing

factor that does not relate to the commission of the offense. The fact of Brown's prior adjudication, then, need not have been charged in the indictment and proved beyond a reasonable doubt to a jury. The fact of the adjudication was properly determined by a judge at a multiple bill hearing where the State had the burden of proving the elements of Louisiana's habitual offender statute, namely that Brown had been adjudicated in a juvenile proceeding of attempted second degree murder.

Moreover, Brown's adjudication was reliably determined in a proceeding which satisfied constitutional standards, including the right to notice, right to counsel, right to confront and cross-examine witnesses, and the privilege against self-incrimination. As required by this Court in *In re Winship*, 397 U.S. 358, 368, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), a judge, as factfinder, employed the reasonable doubt standard of proof when he found that Brown had violated Louisiana's attempted second degree murder statute.

Brown's adjudication was not subject to a right to trial by jury. This Court has held that fundamental fairness does not require the right to a jury trial in juvenile proceedings. In *McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L. Ed. 2d 647, 91 S. Ct. 1976 (1971), this Court ruled that due process does not require the State to provide jury trials to juveniles and recognized that the use of a jury would "not strengthen greatly, if at all, the factfinding function" and is not constitutionally required. *McKeiver*, 403 U.S. at 547. It implicitly follows, then, that the adjudication counts as a conviction for purposes of subsequent sentence enhancement.

Finally, the ultimate difference between Brown's juvenile proceeding and an adult criminal proceeding

concerns the State's having been afforded the ability to exercise a rehabilitative, rather than retributive remedy after Brown's determination of guilt in the juvenile proceeding. However, that difference did not render the disposition of the juvenile case unreliable.

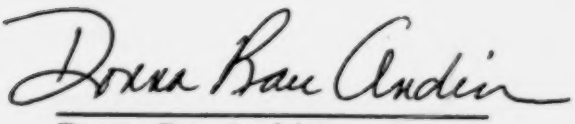
Thus, this Court's *Apprendi* exception necessarily encompassed Brown's juvenile adjudication. The fact of the adjudication did not go toward the commission of Brown's adult offense, and the adjudication was the result of a process in which Brown was afforded all constitutionally required procedural safeguards.

CONCLUSION

The decision of the Supreme Court of Louisiana is contrary to this Court's ruling in *Apprendi*. At issue in this case is an act of recidivism, plainly a sentencing factor and not an element of Brown's offense. Accordingly, the fact of Brown's prior adjudication need not have been charged in the indictment and proved beyond a reasonable doubt to a jury. Consistent with this Court's ruling in *Apprendi*, the fact of Brown's adjudication was properly determined by a judge.

Moreover, Brown's juvenile adjudication was the result of a proceeding in which Brown was afforded all due process protections guaranteed him. The Supreme Court of Louisiana erred when it ruled as unconstitutional the invoking of juvenile adjudications as predicate offenses for purposes of later adult sentence enhancement.

Respectfully submitted,



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APPENDIX A

Supreme Court
STATE OF LOUISIANA
New Orleans

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September 3, 2004

Donna R. Andrieu, ADA
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Re: State of Louisiana
vs.
Quincy Brown
Number 03-K-2788

Dear Counsel:
Enclosed please find a News Release documenting this court's denial of the application for rehearing, in the above entitled referenced case.

With kindest regards, I remain,

Very truly yours,
John Tarlton Olivier
Clerk of Court
/s/ Katherine Fontana
By: Katherine Fontana
Deputy Clerk of Court

KAF: cab
Enclosure
ccs: Eddie J. Jordan, D.A.
Clive Stafford Smith, Esq.
Hon. Kimberly Williamson Butler
Hon. Camille Buras
Stephen 1. Singer, Esq.
Hon. Danielle Schott

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE
NEWS RELEASE # 070

FROM: CLERK OF THE
SUPREME COURT OF LOUISIANA

On the 3rd day of September, 2004, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING (S) DENIED:

2003-C -1016	LINDA BOZEMAN, INDIVIDUALLY AND ON BEHALF OF TOMMY BOZEMAN v. STATE OF LOUISIANA, AND THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT (Parish of Caddo)
2003-K -2788	STATE OF LOUISIANA v. QUINCY BROWN (Parish of Orleans) VICTORY, J., would grant a rehearing. TRAYLOR, J., would grant a rehearing.
2003-C -3436	CURTIS P. MEDINE, INDIVIDUALLY AND MICHAEL BUCK AS TUTOR AND LEGAL GUARDIAN OF JOHN MICHAEL KRAMER, MINOR CHILD OF JANICE BUCK MEDINE v. DR. RICHARD R. RONIGER (Parish of Jefferson) KIMBALL, J., would grant a rehearing. JOHNSON, J., would grant a rehearing. TRAYLOR, J., would grant a rehearing.
2004-C -0066	OCEAN ENERGY, INC. v. PLAQUEMINES PARISH GOV. (Parish of Plaquemines CALOGERO, C.J., would grant a rehearing.
2004-B -0290	IN RE: STEPHEN R. EDWARDS

APPENDIX B

Supreme Court of Louisiana

No. 03-K-2788
July 6, 2004

State of Louisiana
v.
Quincy Brown

KNOLL, Justice.

This criminal case concerns the enhancement of a sentence under Louisiana's Habitual Offender Law; specifically, whether it is constitutionally permissible to use a juvenile adjudication, in which the juvenile had not been afforded the right to a trial by jury, to enhance his sentence for a felony committed when he is an adult. This issue raises the question of whether enhancing the sentence of the defendant on the basis of a prior juvenile adjudication is contrary to *Apprendi v. New Jersey.*[1]

In the present case, when defendant became an adult he committed an armed robbery for which he was convicted by a jury. The sentencing court found defendant a second felony offender as a result of his prior juvenile delinquency adjudication (attempted second-degree murder), and sentenced defendant to 198 years at hard labor without benefit of parole. The court of appeal affirmed his conviction, but reversed his sentence as constitutionally excessive and remanded the case to the trial court for re-sentencing. The court of appeal held the prior juvenile adjudication without the right to a jury trial was constitutionally inadequate under the *Apprendi* exception for

purposes of subsequent sentence enhancement. We granted the State's application for a writ of certiorari[2] to consider this weighty issue of whether the use of juvenile adjudications to enhance a statutory penalty, where the defendant did not have the right to a jury trial, is constitutionally permissible.

FACTS AND PROCEDURAL HISTORY

The facts underlying defendant's charged and prior offenses are not relevant to the issue presented by this writ application, but for the sake of completeness we will briefly summarize the history of the case. After defendant, Quincy Brown, became an adult, he allegedly committed several felony crimes. He was charged by bill of information with two counts of attempted first-degree murder (La.Rev.Stat.14:27(30))[3], one count of armed robbery (La.Rev.Stat.14:64) and one count of simple robbery (La.Rev.Stat.14:65). He pleaded guilty to the simple robbery count and proceeded to trial on the armed robbery charge and the remaining charge of attempted first-degree murder. The jury acquitted defendant of attempted first-degree murder and convicted him of armed robbery. The trial court sentenced him to serve 99 years at hard labor without benefit of parole, probation or suspension of sentence for the armed robbery and to seven years at hard labor with benefits for the simple robbery. The sentences were ordered to run concurrently with credit for time served.

The State then charged defendant as an habitual offender pursuant to La.Rev.Stat. 15:529.1, based on a juvenile adjudication.[4] Defense counsel filed a motion to exclude evidence of the prior adjudication, arguing the use of defendant's juvenile adjudication for purposes of enhancing his sentence under La. Rev. Stat. 15:529.1 is

unconstitutional. The defendant urged the use of the adjudication to enhance the sentence violated *Apprendi*, because in the juvenile proceeding defendant did not have the right to a jury trial. The trial court rejected the motion and found defendant a second felony offender and sentenced him to 198 years at hard labor without benefit of parole for the armed robbery conviction and a concurrent term of 14 years for the simple robbery. Defendant appealed his sentence as excessive and unconstitutional.

A unanimous panel of the appellate court affirmed the conviction, but reversed the sentence as constitutionally excessive. The court of appeal found the trial court erred in enhancing the defendant's sentence on the basis of the prior juvenile conviction. It noted the split in the federal courts of appeal on the issue of whether prior juvenile adjudications, in which the juvenile did not have the right to a jury trial, are constitutionally inadequate under the *Apprendi* exception for purposes of subsequent sentence enhancement. It concluded, based in part on limited guidance from this Court in *State in the Interest of D.J.*,[5] that juvenile adjudications without a right to a jury trial are constitutionally inadequate for purposes of subsequent sentence enhancement. *State v. Brown*, 02-1217, p. 12 (La. Ct.App. 4 Cir. 5/28/03), 853 So.2d 8, 15.

DISCUSSION

Louisiana's Habitual Offender Law is codified at La.Rev.Stat. 15:529.1. In this matter before us, the pertinent language of the statute provides:

> *A.* (1) Any person who, after having been convicted within this state of a felony or *adjudicated a delinquent under Title VIII of*

> *the Louisiana's Children's Code for the commission of a felony-grade violation of either the Louisiana Controlled Dangerous Substances Law involving the manufacture, distribution, or possession with intent to distribute a controlled dangerous substance or a crime of violence as listed in Paragraph (2)*[6] *of this Subsection,* or who, after having been convicted under the laws of any other state or of the United States, or any foreign government of a crime which, if committed in this state would be a felony, thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
>
> (a) If the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less that one-half the longest term and not more than twice the longest term prescribed for a first conviction; (Emphasis added).

The italicized language was added in 1994, when the Legislature enacted Act 23 of the Third Extraordinary Session. The digest for that act provided the proposed law would equate an adjudication of delinquency for the commission of a felony-grade violation of either the Louisiana Controlled Dangerous Substances Law or a crime of violence as a conviction for purposes of sentencing as a habitual offender.

Before we reach the issue of whether La.Rev.Stat. 15:529.1 was unconstitutionally applied in violation of the

defendant's Fourteenth Amendment Due Process right, we will first address whether this constitutional issue can be resolved on statutory grounds. We have repeatedly and consistently held that courts should refrain from reaching or determining the constitutionality of legislation unless, in the context of a particular case, the resolution of the constitutional issue is essential to the decision of the case or controversy. *Ring v. State, Dep't of Transp. and Dev.*, 02-1367, p. 4 (La.1/14/03), 835 So.2d 423, 426; *State v. Fleming,* 01-2799, p. *4* (La.6/21/02), 820 So.2d 467, 470. During oral argument of this case, this court noted that subparagraph (a) of La.Rev.Stat. 15:529.1 A(1) did not refer to juvenile adjudications but only referred to convictions, notwithstanding that paragraph A(1) specifically referred to "adjudicated a delinquent." We requested post-argument briefs to address this discrepancy and specifically, whether this discrepancy would have this case resolved upon statutory grounds rather than constitutional grounds.

In post-argument brief, defendant posited because a prior adjudication of delinquency is not a felony, it cannot be used to make the current conviction a second felony under La.Rev.Stat. 15:529.1 A(1)(a). We find a statutory analysis shows notwithstanding the discrepancy in the language, the adult offense was intended to be treated as a "second felony" where the offender had only a prior juvenile adjudication.

It is a well-established tenet of statutory construction that criminal statutes are subject to strict construction under the rule of lenity. *State v. Carr,* 99-2209, p. 4 (La.5/26/00), 761 So.2d 1271, 1274. Thus criminal statutes are given a narrow interpretation and any ambiguity in the substantive provisions of a statute as written is resolved in favor of the accused and against the State. *Id.* However, the rule of strict construction of penal statutes is not to be applied with "such

unreasonable technicality as to defeat the purpose of all rules of statutory construction, which purpose is to ascertain and enforce the true meaning and intent of the statute." *State v. Everett*, 00-2998, p. 12 (La.5/14/02), 816 So.2d 1272, 1279, *reh'g denied*, 6/21/02, quoting *State v. Broussard*, 213 La. 338, 342, 34 So.2d 883, 884 (La.1948). The general rule that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity applies when the court is uncertain about the statute's meaning and is "not to be used in complete disregard of the purpose of the legislature." *Perrin v. United States*, 444 U.S. 37, 49, n. 13, 100 S.Ct. 311, 317, 62 L.Ed.2d 199 (1979). The principle of strict construction "does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." *United States v. Levy*, 579 F.2d 1332, 1337 (5th Cir.1978), *cert denied*, 440 U.S. 920, 99 S.Ct. 1243, 59 L.Ed.2d 471 (1979) (quoting *United States v. Bramblett*, 348 U.S. 503, 510, 75 S.Ct. 504, 508, 99 L.Ed.2d 594 (1955)). A criminal statute, like all other statutes, should be so interpreted as to be in harmony with, preserve, and effectuate the manifest intent of the legislature, and an interpretation should be avoided which would operate to defeat the purpose and object of the statute. *Broussard*, 34 So.2d at 884.

An examination of Act No. 23 clearly reveals the Legislature intended to provide that any person who had been adjudicated a delinquent for certain felony-grade violations was subject to sentence enhancement for a subsequent felony conviction. In order to effectuate this purpose, Act No. 23 did not just amend Louisiana's Habitual Offender Law (La.Rev.Stat.15:529.1), but also amended Children's Code Article 414(A), Code of Evidence Article 609.1(F) and enacted Children's Code Article 412(A)(6). These revisions and enactments were necessary because the

law generally provided that all records concerning proceedings in juvenile court were confidential and not to be disclosed. A reading of the transcript of the meeting of the Senate Committee on Judiciary B, in which House Bill No. 343[7] was discussed, further evidences the Legislature's intent to make juvenile adjudications subject to predicate offenses for felony sentence enhancement.

Considering the extensive revisions the Legislature made to Louisiana law, which not only included the amendment to the Habitual Offender Law but corresponding changes to the Children's Code and the Code of Evidence, it is evident the Legislature's manifest intent was to provide that any person who had been adjudicated a delinquent for certain felony-grade violations was subject to subsequent sentence enhancement for conviction of a felony. Even though Quincy Brown's conviction for armed robbery is technically not a "second felony" because his juvenile adjudication was not a first "felony," an application of the rule of lenity to this ambiguity would be an unreasonable technicality, which would defeat the purpose and object of the statute. To find that the rule of lenity prohibits sentence enhancement where the defendant was adjudicated a delinquent because the felony is not technically a "second" felony simply stretches the general rule of strict construction too far. The Court has a duty to ascertain the intent of the legislature. Under these tenets, the most logical interpretation is to find the statute provides that the felony is subject to enhanced penalties if the defendant had previously been adjudicated a delinquent. Thus we will address the constitutional issue defendant has raised.

The Constitutionality of Non-Jury Juvenile Adjudications as Predicate Offenses

A proper discussion of the constitutional issue before us must commence with the United State's Supreme Court's decision in *Apprendi v. New Jersey, supra.* The question before the Supreme Court was whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence be made by a jury on the basis of proof beyond a reasonable doubt. *Apprendi*, 530 U.S. at 469, 120 S.Ct. at 2351. The catalyst for this issue was a New Jersey hate crime statute, which authorized a judge to increase a defendant's maximum prison sentence if the trial court found by a preponderance of the evidence that in committing the crime, the defendant acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity. Charles Apprendi pleaded guilty to two counts of firearm possession for an unlawful purpose and one count of unlawful possession of an antipersonnel bomb. The trial judge imposed an enhanced sentence, finding by a preponderance of the evidence that Apprendi's actions were taken with a purpose to intimidate as provided by the statute. "The question of whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt [was] starkly presented." *Apprendi*, 530 U.S. at 476, 120 S.Ct. at 2355. The Court declared the answer was foreshadowed by its opinion in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) , construing a federal statute. "We there noted that 'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an

indictment, submitted to a jury, and proven beyond a reasonable doubt.' " *Apprendi*, 530 U.S. at 476, 120 S.Ct. at 2355, quoting *Jones*, 526 U.S. at 243, n. 6, 119 S.Ct. at 1224. The *Apprendi* court found the Fourteenth Amendment commands the same answer in the case of a state statute. *Apprendi*, 530 U.S. at 476, 120 S.Ct. at 2355.

The Court ruled "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-63. It reasoned due process required a jury to find the facts upon which a court based an enhanced sentence as an "element" of the offense at trial, rather than to allow a judge to find those facts by a preponderance of the evidence as a "sentencing factor" at a sentencing hearing. Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1112 (2003). The Court exempted the fact of a prior conviction from its holding because defendants enjoyed criminal procedural safeguards, including the right to a jury trial and proof beyond a reasonable doubt, which assured the accuracy and reliability of the prior record. *Id.*

After *Apprendi*'s holding that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," courts around the nation have been confronted with the question of whether a juvenile adjudication falls within the *Apprendi* exception for "prior convictions." The federal appellate courts have divided over the use of delinquency adjudications to enhance criminal sentences beyond the

statutorily mandated maximum. The question that has divided the federal circuits is whether a prior juvenile adjudication, in which the juvenile does not have the right to a jury trial, qualifies as a "prior conviction" for purposes of the *Apprendi* exception. In each of these federal cases, the court reviewed the legality of using juvenile adjudications to enhance an adult sentence above a prescribed statutory maximum pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). Congress has characterized juvenile adjudications as prior convictions under the ACCA. 18 U.S.C. § 924(e)(2)(B), (e)(2)(C).

The Ninth Circuit Court of Appeals became the first court in *Apprendi*'s wake to report a published decision on this issue. Brian Thill, Comment, *Prior "Convictions" Under Apprendi: Why Juvenile Adjudications May Not Be Used to Increase an Offender's Sentence Exposure if They Have Not First Been Proven To a Jury Beyond a Reasonable Doubt*, 87 MARQ. L. REV. 573, 575 (2004) [hereinafter *Prior Convictions*]. In *United States v. Tighe,*[8] a divided panel held *Apprendi*'s narrow "prior conviction" exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt. 266 F.3d at 1194. In reaching this conclusion, the *Tighe* court noted the significant constitutional differences between adult convictions and juvenile adjudications, and inquired into the scope of the term "conviction" as used by the Supreme Court in *Apprendi,* and the cases[9] leading up to *Apprendi*. *Tighe*, 266 F. 3d at 1192-93.

In examining the Supreme Court jurisprudence concerning the use of prior convictions as a sentencing factor, the Tighe court stated:

[I]n *Jones v. United States,* ... [t]he Court explained why the fact of prior convictions was constitutionally distinct from other sentence-enhancing facts, such that it was permissible, under *Almendarez-Torres,* to use prior convictions to increase the possible penalty for an offense without treating them as an element of the current offense: "One basis for that constitutional distinctiveness [of prior convictions] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense ... a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees." *Jones*, 526 U.S. at 249, 119 S.Ct. [at 1227] (emphasis added). Thus, *Jones'* recognition of prior convictions as a constitutionally permissible sentencing factor was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions: fair notice, reasonable doubt and the right to a jury trial.

One year later, in *Apprendi,* the ... Court explained that "the certainty that procedural safeguards attached to the 'fact' of prior conviction" was crucial to *Almendarez-Torres'* constitutional holding regarding prior convictions as sentencing factors. *Apprendi*, 530 U.S. at 488, 120 S.Ct. [at 2362].... "There is a vast difference between accepting the

> validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Apprendi*, 530 U.S. at 496, 120 S.Ct. [at 2366].

Tighe, 266 F.3d at 1193-94.

The *Tighe* court found the United States Supreme Court's continued acceptance of *Almendarez-Torres*' holding regarding prior convictions was premised on those convictions being the product of proceedings that afford crucial procedural protections, particularly the right to a jury trial and proof beyond a reasonable doubt. *Tighe*, 266 F.3d at 1194. The court therefore reasoned the "prior conviction" exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. *Id.* The court held juvenile adjudications that do not afford these due process rights do not fall within *Apprendi*'s "prior conviction" exception. *Id.* The Eighth Circuit disagreed with the Ninth Circuit's *Tighe* decision. In *United States v. Smalley,*[10] the court held juvenile adjudications can count as prior convictions for *Apprendi* purposes. 294 F.3d at 1033. The *Smalley* court rejected *Tighe*'s analysis, "conclud[ing] that the question of whether juvenile adjudications should be exempt from *Apprendi*'s general rule should not turn on the narrow parsing of words, but on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption." *Smalley*, 294 F.3d at 1033.

Noting that juvenile defendants have the right to notice, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self incrimination, and that there must be a finding of guilt beyond a reasonable doubt, see *In re Winship*, 397 U.S. 358, 368, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), the court found these safeguards more than sufficient to ensure the reliability *Apprendi* requires. *Smalley*, 294 F.3d at 1033. While *Apprendi* established what procedural safeguards were sufficient (a right to a jury trial and proof beyond a reasonable doubt), and what were not (judge-made findings under a lesser standard of proof), "the Court did not take a position on possibilities that lie in between these two poles." *Id.* at 1032. "[I]t is incorrect to assume that it is not only sufficient but necessary that the 'fundamental triumvirate of procedural protections,' as the Ninth Circuit put it, underly [sic] an adjudication before it can qualify for an *Apprendi* exception." *Id.* The *Smalley* court recognized a jury does not have a role in trials for juvenile offenses, but did not think that fact undermines the reliability of such adjudications in any significant way because the use of a jury in the juvenile context would "not strengthen greatly, if at all, the fact-finding function" and is not constitutionally required. *Id.* at 1033, quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 547, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971).

The Third Circuit addressed this issue, considering both the *Tighe* and *Smalley* decisions. *United States v. Jones*, 332 F.3d 688 (3rd Cir.2003), cert denied --- U.S. ----, 124 S.Ct. 1145, 157 L.Ed.2d 1044 (2004). The *Jones* court, like the *Smalley* court, found nothing in *Apprendi* or *Jones v. United States* that required holding prior nonjury juvenile adjudications, where all required due process safeguards were afforded, cannot be used to enhance a sentence under

the ACCA. *Jones*, 332 F.3d at 696. A prior nonjury juvenile adjudication that was afforded all constitutionally-required procedural safeguards can properly be characterized as a prior conviction for *Apprendi* purposes. *Id.* The Supreme Court, in *McKeiver, supra,* held due process does not require providing juveniles with the right to a jury trial. Therefore, the *Jones* court held when a juvenile is adjudicated guilty beyond a reasonable doubt in a bench trial that affords all the due process protections that are required, the adjudication should be counted as a conviction for purposes of subsequent sentencing. *Id.*

Thus, as can be seen, following *Apprendi* there are two reasonable schools of thought on whether juvenile adjudications, in which the juvenile did not have the right to a jury, can properly be characterized as "prior convictions" for felony sentence enhancement purposes.[11] The State, adopting the rationale of the *Smalley* and *United States v. Jones* decisions, argues the defendant was afforded all the safeguards that were constitutionally due in his juvenile proceedings. Therefore, the adjudication was reliable for purposes of the exception under *Apprendi,* and its use as a predicate crime under La.Rev.Stat. 15:529.1 is proper. The defendant contends *Jones v. United States* and *Apprendi* foreclose the use of juvenile adjudications to enhance an adult sentence, where the juvenile did not have the right to a jury trial.[12] In deciding this difficult question, we turn to our recent jurisprudence concerning the juvenile justice system and scholarly works addressing this issue to assist us.

A review of the history of juvenile courts illustrates why juvenile courts have fewer procedural safeguards. The juvenile court movement began near the end of the nineteenth century because "reformers were appalled by adult procedures and penalties, and by the fact that children

could be given long prison sentences and mixed in jails with hardened criminals." Jeremy Hochberg, Note, *Should Juvenile Adjudications Count as Prior Convictions for Apprendi Purposes*?, 45 WM. & MARY L. REV. 1159, 1172 [hereinafter Juvenile Adjudications] (quoting *In re Gault*, 387 U.S. 1, 15, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967)). The juvenile court movement combined new ideas about children with the new ideology of social control to remove children from the criminal justice system and to provide them with individualized treatment in a separate system. Feld, *supra* at 1138. Under the guise of *parens patriae*, juvenile courts emphasized treatment, supervision, and control rather than punishment, and exercised broad discretion to intervene in the lives of young offenders. Id. Characterizing intervention as a civil or welfare proceeding completed the separation of juvenile from criminal courts and allowed greater authority to control and supervise children. *Id.*

Because of the rehabilitation rationale, the courts justified making the juvenile court less formal. *Juvenile Adjudications*, *supra*, at 1173. Reformers modified courtroom procedures to eliminate any implication of a criminal proceeding, adopted a euphemistic vocabulary, and endorsed a physically separate court building to avoid the stigma of adult prosecutions. Feld, *supra*, at 1138-39. The early reformers "believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' ... [t]he child--essentially good, as they saw it--was to be made 'to feel that he is the object of (the state's) care and solicitude,' not that he was under arrest or on trial." *In re Gault*, 387 U.S. 1, 15, 87 S.Ct. 1428, 1437, 18 L.Ed.2d 527 (1967) (citation omitted). The purpose of sanctions would be for therapeutic and rehabilitative purposes, not for retribution or incapacitation. *Prior Convictions, supra*, at 584.

In *In re C.B. et al.*,[13] with Chief Justice Calogero authoring the opinion, we addressed the constitutionality of a statute that authorized the Department of Public Safety and Corrections to transfer juveniles who had been adjudicated delinquent to adult facilities upon reaching age seventeen, to be treated for punitive purposes the same as the convicted adult felons with whom they were confined. We found the statute, La.Rev.Stat. 15:901.1, unconstitutional as applied by Regulation B-02-008 as it denied the juveniles their constitutional right to due process guaranteed them by Article I, § 2[14] of the Louisiana Constitution. *In re C.B.*, p. 6, 708 So.2d at 395. We found it unconstitutional because they received a de facto criminal sentence to hard labor without being afforded the right to trial by jury as mandated by Article I, § 17[15] of our state constitution. *Id.*

In reaching this determination, we noted "the unique nature of the juvenile system is manifested in its non-criminal, or 'civil' nature, its focus on rehabilitation and individual treatment rather than retribution, and the state's role as *parens patriae* in managing the welfare of the juvenile in state custody." *Id.* p. 10, 708 So.2d at 396-97 (citing, *inter alia*, *McKeiver, supra*). We reviewed the procedure this Court uses to determine which due process rights are guaranteed to juveniles. In making these determinations, an attempt is made to "strike a judicious balance by injecting procedural orderliness into the juvenile court system ... to reverse the trend whereby 'the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.' " *In re C.B.*, p. 12, 708 So.2d at 398 (quoting *McKeiver*, 403 U.S. at 545, 91 S.Ct. at 1986, quoting *Kent v. United States*, 383 U.S. 541, 556, 86 S.Ct. 1045, 1054, 16 L.Ed.2d 84 (1966)). Based

on the United States Supreme Court's reasoning in *McKeiver*, we previously determined due process and fundamental fairness did not require that the juvenile be granted the right to trial by jury, *State in the Interest of Dino*, 359 So.2d 586, 597-98 (La.1978),[16] even though that right is guaranteed by Article I, § 17 of our state constitution in certain criminal cases. *In re C.B.*, p. 13, 708 So.2d at 398 (emphasis in original). In *McKeiver,* the Supreme Court determined the Sixth Amendment of the Federal Constitution did not apply in juvenile adjudications because the juvenile proceeding had not yet been held to be a "criminal prosecution" within the meaning and reach of the Sixth Amendment. *McKeiver*, 403 U.S. at 541, 91 S.Ct. at 1984. Among the reasons the Court gave for finding jury trials in juvenile proceedings are not constitutionally required was the imposition of a jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function and would tend to place the juvenile squarely in the routine of the criminal process, *Id.* at 547, 91 S.Ct. at 1987, from which juveniles had been removed by the reforms of the late nineteenth century. The Court was reluctant to give up on the promise of the juvenile system concept and in the belief the system could still accomplish its rehabilitative goals. *Id.*

Therefore when we were confronted with the constitutionality of the application of a statute that allowed adjudicated juveniles to be transferred to adult facilities, we found the statute unconstitutional as applied, holding the statute through its corresponding regulation had sufficiently tilted the scales away from a "civil" proceeding, with its focus on rehabilitation, to one purely criminal. *In re C.B.*, p. 17, 708 So.2d at 400. Due process and fundamental fairness required that the juvenile have a jury trial if he or she was to be incarcerated at hard labor in an adult penal facility. Id.

The determination in *McKeiver* that a jury trial was not constitutionally required in juvenile adjudications was predicated upon the non-criminal treatment of the adjudicated delinquent. *In re C.B.*., p. 14, 708 So.2d at 399. "It therefore stands to reason that if the civil trappings of the juvenile adjudication are sufficiently subverted, then a proceeding without that safeguard is fundamentally unfair, and thus, violative of due process." *Id.* "The hallmark of special juvenile procedures is their non-criminal nature." *Id.*, p. 17, 708 So.2d at 400.

We recently had cause to re-visit the issue of the right to jury trials in our juvenile justice system in *State in the Interest of D.J., supra.* There we reaffirmed our holding in *State in the Interest of Dino,* denying juveniles a constitutional right to a jury trial in delinquency proceedings. State in the Interest of D.J., p. 9, 817 So.2d at 32. The juveniles and the amici argued the policy-based analysis applied when *McKeiver* and *Dino* were decided was outdated. *Id.* p. 7, 817 So.2d at 30. They contended, *inter alia*, the amendment to the Habitual Offender Law to allow use of juvenile adjudications to enhance subsequent adult felony offenses had torn down the remaining characteristics of what traditionally identified the juvenile system.[17]

We noted we had specifically discussed these amendments in *In re C.B.* We found our holding in *In re C.B.* "significant, because it infers that the Court determined that the other statutes that 'blurred the distinction' between adult and juvenile proceedings, such as the public hearing and the sentence enhancement statutes, did not offend due process requirements to such an extent that a jury trial would be required." *State in the Interest of D.J., p. 10, 817 So.2d at 33.* However, in finding continued viability in our Dino holding that due process does not afford a juvenile the right

to a jury trial in a delinquency adjudicatory proceeding, we found further support in the fact that "notwithstanding the changes in the juvenile system ... there remains a great disparity in the severity of penalties faced by a juvenile charged with delinquency and an adult defendant charged with the same crime." *State in the Interest of D.J.*, p. 10, 817 So.2d at 33.

Notwithstanding our finding in *State in the Interest of D.J.*, where we inferred the sentence enhancement statutes did not offend due process requirements to such an extent that a jury trial would be required in juvenile adjudicatory proceedings, we find because juveniles do not have a right to a jury trial in these proceedings, juvenile adjudications cannot be used to enhance adult felony convictions pursuant to La.Rev.Stat. 15:529.1. We have well established that juvenile adjudications in Louisiana are sufficiently reliable, even without a jury trial, to support dispositions within the juvenile justice system. However, *Apprendi* has raised the issue of whether these adjudications, rendered without the right to a jury trial, are sufficiently reliable to support enhanced sentencing for adults. For the reasons that follow, we find they are not.

Under the guise of *parens patriae*, juvenile courts emphasize treatment, supervision, and control rather than punishment. Feld, supra, at 1138. The hallmark of special juvenile procedures is their non-criminal nature. *In re C.B.*, p. 17, 708 So.2d at 400. Our state's juvenile system was founded upon the premise that retributive punishment was deemed inappropriate and the juvenile system dispositions should be individually tailored to address the needs and abilities of the juvenile in question. *Id.*, p. 8, 708 So.2d at 395-96. Because of the unique nature of the juvenile system manifested in its non-criminal or "civil" nature, its focus on

rehabilitation and individual treatment rather than retribution, and the state's role as *parens patriae* in managing the welfare of the juvenile in its custody, the United States Supreme Court held, despite disappointments, failures and shortcomings in the juvenile court system, juveniles were not constitutionally entitled to jury trials. *McKeiver*, 403 U.S. at 545, 91 S.Ct. at 1986.

Even though it was argued that because (1) the juvenile justice system had taken on more of the trappings of the criminal justice system; (2) the role of punishment had increased in the juvenile system; and (3) the legislative amendments opening the proceedings to the public and allowing juvenile adjudications to serve as predicate offenses for adult felony sentence enhancement, due process required juveniles receive a jury trial, we continued to uphold *Dino*'s decree that Art. I, § 2 of our State Constitution does not afford a juvenile the right to a jury trial in a juvenile proceeding. *State in the Interest of D.J.*, p. 13, 817 So.2d at 34. Among our reasons for our continued holding is that even with the changes in the juvenile justice system, "there remains a great disparity in the severity of penalties faced by a juvenile charged with delinquency and an adult defendant charged with the same crime." *Id.* p. 10, 817 So.2d at 33. To allow these adjudications to serve as "prior convictions" for purposes of sentence enhancement for adult felony offenses would lessen this disparity and contribute to "blurr[ing] the distinction between juvenile and adult procedures." *In re C.B.*, p. 8, 708 So.2d at 396.

We find there is a difference between a "prior conviction" and a prior juvenile adjudication, and we believe the *Tighe* decision more closely comports with the rationale for finding juveniles are not constitutionally entitled to a jury trial. A "prior conviction must itself have been established

through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees." *Tighe*, 266 F.3d at 1193 (quoting *Jones v. United States*, 526 U.S. at 249, 119 S.Ct. at 1227). Our holdings that due process does not require juveniles be afforded all the guarantees afforded adult criminals under the constitution have been premised upon the "civil nature" of a juvenile adjudication, its focus on rehabilitation and the state's role as *parens patriae*. If a juvenile adjudication, with its lack of a right to a jury trial which is afforded to adult criminals, can then be counted as a predicate offense the same as a felony conviction for purposes of Louisiana's Habitual Offender Law, then "the entire claim of *parens patriae* becomes a hypocritical mockery." *In re C.B.*, p. 17, 708 So.2d at 400 (quoting *Londerholm v. Owens*, 197 Kan. 212, 416 P.2d 259, 269 (1966)).

A juvenile adjudication is not a conviction of any crime. *In re C.B.*, p. 17, 708 So.2d at 400. Therefore, this adjudication should not be counted as a "prior conviction" for *Apprendi* purposes. The determination that a jury trial was not constitutionally required in juvenile adjudications was predicated upon the non-criminal treatment of the adjudicated juvenile delinquent. *Id.* p. 14, 708 So.2d at 399. It would be incongruous and illogical to allow the non-criminal adjudication of a juvenile delinquent to serve as a criminal sentencing enhancer.[18] To equate this adjudication with a conviction as a predicate offense for purposes of the Habitual Offender Law would subvert the civil trappings of the juvenile adjudication to an extent to make it fundamentally unfair and thus, violative of due process. In order to continue holding a trial by jury is not constitutionally required, we cannot allow these adjudications, with their civil trappings, to be treated as predicate offenses the same as felony convictions. It seems

contradictory and fundamentally unfair to provide youths with fewer procedural safeguards in the name of rehabilitation and then to use adjudications obtained for treatment purposes to punish them more severely as adults. Feld, supra, at 1194. It is inconsistent to consider juvenile adjudications civil for one purpose and therefore not constitutionally entitled to a jury trial, but then to consider them criminal for the purpose of classifying them as "prior convictions," which can be counted as predicate offenses for purposes of the Habitual Offender Law.

We do not agree with the *Smalley* court and its progeny that because the procedures of juvenile adjudications are sufficiently reliable for juvenile dispositions, they are therefore reliable to "justify the much harsher consequences of their use as criminal sentence enhancements." *Feld, supra*, at 1190. We find, as did the *Tighe* court, the guidance from our United States Supreme Court indicates recidivism is distinct as a sentencing factor and therefore as an exception to the general rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt[,]" *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-63, because "unlike virtually any other consideration used to enlarge the possible penalty for an offense, ... a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones v. United States*, 526 U.S. at 249, 119 S.Ct. at 1227 (emphasis added). Because a juvenile adjudication is not established through a procedure guaranteeing a jury trial, it cannot be excepted from *Apprendi's* general rule; the use of these adjudications to increase the penalty beyond the statutory maximum violates the defendant's Due Process right guaranteed by the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For the foregoing reasons, we find it is unconstitutional to apply La.Rev.Stat. 15.529.1 for the purpose of allowing juvenile adjudications to be counted as predicate offenses, where these adjudications were obtained without the right to a jury trial. In our view, the use of such adjudications violates *Apprendi*'s narrow exception, which exempts only "prior convictions" from its general rule that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Although these adjudications can be reliably and constitutionally obtained without the right to a jury trial, this is because the juvenile proceeding is a "civil" proceeding with a focus on rehabilitation and non-criminal treatment of the adjudicated delinquent. "Prior convictions" are excepted from the *Apprendi* holding because they were the product of proceedings that afforded crucial procedural protections--particularly fair notice, the right to jury trial and proof beyond a reasonable doubt.

DECREE

The judgment of the appellate court is affirmed for the reasons expressed herein. We reverse the sentence as unconstitutional, as it violates the defendant's due process rights. The case is remanded to the trial court for re-sentencing consistent with the views expressed in this opinion.

AFFIRMED.

VICTORY, J., dissents for the reasons assigned by TRAYLOR,
TRAYLOR, J., dissents and assigns reasons.

TRAYLOR, Justice, dissenting.

I disagree with the majority's interpretation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and believe that a fair reading of Apprendi does not require this court to preclude the use of a juvenile adjudication to enhance an adult criminal sentence. In my opinion, *United States v. Smalley*, 294 F.3d 1030 (8th Cir.2002), and *United States v. Jones*, 332 F.3d 688 (3rd Cir.2003), reliance on *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971), which held that the right to a jury trial is not required to fulfill the fundamental fairness due process standard in a juvenile proceeding, is dispositive in this case. Accordingly, I would hold that it is constitutionally permissible to use a juvenile adjudication to enhance an adult criminal sentence where the juvenile adjudication comports with the requirements of fundamental fairness as set out in *McKeiver*: notice, counsel, confrontation, cross-examination, and standard of proof.

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[1] 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

[2] *State v. Brown*, 03-2788 (La.2/6/04), 866 So.2d 805.

[3] The State later entered a *nolle prosequi* to one of the attempted murder counts.

[4] Previously the defendant was adjudicated a delinquent for attempted second-degree murder.

[5] 01-2149 (La.5/14/02), 817 So.2d 26. The appellate court found a footnote in *State in the Interest of D.J.*, strongly hinted the difference in adjudication procedures might require the exclusion of such adjudications from later enhancement proceedings. *Brown*, p. 11, 853 So.2d at 15. Addressing the fact that before the amendment to the Habitual Offender Law allowing adjudications to enhance subsequent felony offenses, juvenile adjudications were sealed and did not follow an individual into adulthood, we noted:

In *United States v. Tucker*, 404 U.S. 433, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) and *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), the Supreme Court prohibited the use of prior convictions that were entered without the advice of counsel to enhance later sentences. In a related vein, some commentators suggest that the practice of using juvenile convictions obtained without the option to be tried by a jury to enhance adult sentences renders the juvenile justice system unconstitutional. See e.g., Sara E Kropf, Note, *Overturning McKeiver v. Pennsylvania: The Unconstitutionality of Using Prior Convictions to Enhance Adult Sentences Under the Sentencing Guidelines*, 87 Geo. L.J. 2149 (1999); David Dormont, Note, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 Minn. L.Rev. 1769, 1793-94 (1991). *State in the Interest of D.J.*, p. 8, 817 So.2d at 39, n. 6.

[6] Paragraph 2 lists the following crimes: attempted first-degree murder; attempted second-degree murder; manslaughter; armed robbery; forcible rape; simple rape; second-degree kidnapping; a second or subsequent aggravated battery; a second or subsequent aggravated burglary; and a second or subsequent offense of burglary of an inhabited dwelling.

[7] House Bill No. 343 was subsequently enrolled as Act No. 23, 3rd Extraordinary Session, 1994.

[8] 266 F.3d 1187 (9th Cir.2001). leading up to *Apprendi. Tighe*, 266 F.3d at 1192-93.

[9] The United States Supreme Court first held that prior convictions could be treated as sentencing factors that raise the maximum penalty of an offense in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). *Almendarez-Torres* involved a statute that authorized a maximum prison sentence of two years for an alien who returned to the United States despite previous deportation, but a maximum sentence of twenty years if the initial deportation was subsequent to a conviction for an aggravated felony. The defendant argued the fact of his prior conviction, which was used to increase the statutorily mandated maximum punishment, was an element of his offense and should have been charged in the indictment. The question

before the Court was "whether this latter provision defines a separate crime or simply authorizes an enhanced penalty." *Id.* at 226, 118 S.Ct. at 1222. The Court held it to be a penalty provision, "which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime." *Id.*

The next term in *Jones v. United States, supra,* the Court considered *Almendarez-Torres's* holding regarding the use of prior convictions in the context of emerging concerns about the viability of using facts not charged in the indictment nor proved to a jury beyond a reasonable doubt to increase the statutory maximum penalty to which a defendant is exposed. In *Jones,* the defendant was charged with carjacking in violation of 18 U.S.C. § 2119, which provides that a person possessing a firearm who takes a motor vehicle from the person or presence of another by force or intimidation shall: 1) be imprisoned not more than fifteen years; 2) if serious bodily injury results be imprisoned not more than 25 years; and 3) if death results be imprisoned for any number of years up to life. The indictment made no reference to the numbered subsections and charged none of the facts mentioned in the latter two. Defendant was told at the arraignment that he faced a maximum 15 year sentence for carjacking, and the jury instructions at his trial defined that offense by reference solely to § 2119(1). The trial judge, after determining that one of the victims suffered serious bodily injury, imposed a 25 year sentence. The defendant argued that serious bodily injury was an element of the offense that had neither been pleaded in the indictment nor proven to the jury. The United States Supreme Court held the carjacking statute established three separate offenses by the specification of distinct elements, each of which must be charged by indictment and proven to a jury beyond a reasonable doubt. *Jones v. United States*, 526 U.S. at 252, 119 S.Ct. at 1228.

[10] 294 F.3d 1030 (8th Cir.2002), *cert denied* 537 U.S. 1114, 123 S.Ct. 870, 154 L.Ed.2d 790 (2003).

[11] We have found the sole state supreme court addressing this issue is Kansas. That court was presented with the question of whether the absence of the jury trial safeguard in juvenile adjudications was enough to remove it from the narrow exception for prior convictions built into the *Apprendi* rule. *State v. Hitt*, 273 Kan. 224, 42 P.3d 732, 736 (2002), *cert. denied* 537 U.S. 1104, 123 S.Ct. 962, 154 L.Ed.2d 772 (2003). It held juvenile adjudications are included within the historical cloak of

recidivism and enjoy ample procedural safeguards and therefore, are encompassed within the *Apprendi* exception. *Id.* at 740.

[12] Additionally, the defendant strenuously argues a majority on the United States Supreme Court appears to have moved rapidly away from the position taken in *Almendarez-Torres* that recidivism "does not relate to the commission of the offense, but goes to the punishment only, and therefore ... may be subsequently decided [by a judge]." 523 U.S. at 244, 118 S.Ct. at 1231. We decline the invitation to speculate as to what the Court's position is, or may become, on treating recidivism as a factor in sentence enhancement, and restrict ourselves to the guidance thus far provided by the Court's holdings.

[13] 97-2783 (La.3/4/98), 708 So.2d 391.

[14] Article I, § 2 provides: "No person shall be deprived of life, liberty, or property, except by due process of law."

[15] Article I, § 17 of the Louisiana Constitution is our state counterpart to the Sixth Amendment of the Federal Constitution which grants the right to trial by jury to certain criminal defendants.

[16] *cert. denied*, 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 706 (1978), rev'd on other grounds, *State v. Fernandez*, 96-2719 (La.4/14/98), 712 So.2d 485.

[17] The other legislative amendment argued to have torn down the remaining characteristics of what traditionally identified the juvenile system was the amendment to La. Ch.Code art. 407(A), opening to the public all proceedings in juvenile delinquency cases involving crimes of violence.

[18] While we note sentencing courts frequently refer to and consider a defendant's juvenile record when imposing a statutory sentence for a proscribed crime, that is not the same as counting these adjudications as predicate offenses for the purpose of imposing the harsher mandatory sentence required by Louisiana's Habitual Offender Law.

APPENDIX C

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

September 09, 2003

The following action was taken on applications for rehearing:

* * * * * *

2002-KA-1217 **REHEARING DENIED**
STATE OF LOUISIANA vs
QUINCY BROWN
(Byrnes, Love, **Lombard**)

APPENDIX D

Court of Appeal of Louisiana
Fourth Circuit

No. 2002-KA-1217
May 28, 2003

State of Louisiana
v.
Quincy Brown

EDWIN A. LOMBARD, Judge.

STATEMENT OF CASE

On May 10, 1999, Quincy Brown was charged by bill of information with a violation of La. R.S. 14:27(30), relative to the attempted first degree murder of Alvin Harris on March 17, 1999 (Count One); a violation of *La. R.S. 14:64*, relative to the March 11, 1999 armed robbery of Wayne Matthews (Count Two); a second violation of La. R.S. 14:27(30), relative to the February 7, 1999 attempted first degree murder of Leonard Jordan (Count Three); and a violation of La. R.S. 14:65, relative to the March 15, 1999 simple robbery of Yul Knighten (Count Four). Mr. Brown's case was received in Section "F" and transferred to Section "H" on May 14, 1999 to follow Case No. 406-784 in which he was charged with first degree murder.[1]

Mr. Brown pled not guilty at the arraignment on May 27, 1999. On August 6, 1999, the trial court heard testimony

on defendant's motion to suppress the identification in Counts Two and Four (the armed robbery and simple robbery charges). The court denied the motion on count two and left the matter open as to Count Four. On August 18, 1999, defendant filed a motion to quash the indictment or, alternatively, to sever the counts in the indictment. The court heard testimony on defendant's motion to suppress the identification on the remaining counts and continued the matter. On October 15, 1999, the court resumed the suppression hearing on the motions to suppress identification. The trial court denied the motion to suppress as to Count Three, and the court denied the motion as to Count One and Four as moot. The court also denied the motion to quash or to sever the counts. The writ was denied by this court and similarly denied by the Louisiana Supreme Court.

On October 15, 1999, the trial court, after hearing, denied Mr. Brown's Motion to Suppress the Identification with respect to Count Three, and denied in part the Motion to Suppress the Identification with respect to Count Four. On July 28, 1999, the trial court granted defendant's ex parte Motion for Appointment of Second Counsel naming Harold Ducloux as second counsel, who represented Mr. Brown on July 28, 1999 and through sentencing. Mr. Brown was also represented by Dwight Doskey of the Orleans Indigent Defender Program.

On November 9, 1999, defense counsel Marie Scavetta filed a motion to compel disclosure. On December 14, 1999 the court heard testimony on discovery matters and defendant reurged the motion for severance. On January 13, 2000, the trial court granted attorney Marie Scavetta a motion to withdraw as counsel and granted attorney Stephen Singer's motion to appear pro hac vice in the matter. On February 8, 2000, defendant filed a second motion to quash the indictment

or, in the alternative, for severance. On March 1, 2000, the court heard argument, and the trial court denied the motion. Defendant filed a notice of intent to seek writs and to stay the proceedings. The trial court denied the motion for stay. On May 3, 2000, this court denied defendant's writ application on the showing made. *State v. Brown*, 2000-0560, *unpub.* (La.App. 4 Cir. 5/3/00), *stay denied*, 2000-1249 (La.5/3/00), 760 So.2d 1184, *writ denied*, 2000-1584 (La.6/30/00), 767 So.2d 42.

On January 26, 2001, the trial court granted the State's motion to remove Mr. Singer from representation in the first degree murder case and appointed Clive Stafford Smith, also of the Louisiana Crisis Assistance Center, to represent Mr. Brown. Apparently, there was some confusion over whether Mr. Singer had been removed from this case. A hearing on the issue was conducted May 4, 2001 after which Mr. Smith enrolled as counsel. Defendant sought review in this court regarding the removal of Stephen Singer as co-counsel and this court found that while there was nothing to indicate that Mr. Singer had been removed from the instant case in January, this court found on the basis of its previous ruling in an unrelated writ, *State v. Landry*, 2000-2414, *unpub.* (La.App. 4 Cir. 1/9/01), that he should be removed because his presence in Louisiana courts practicing as an out-of-state attorney had been ongoing for so long that he was no longer qualified to appear pro hac vice. *State v. Brown*, 2001-0875, *unpubl.* (La.App. 4 Cir. 6/01/01). Defendant sought review in the Louisiana Supreme Court, and the court remanded the case to allow Mr. Singer to demonstrate that he was "temporarily present in this state" and whether he possessed the professional competence and ethical responsibility of an attorney admitted to practice in Louisiana. *State v. Landry*, 2001-1641, 2001-0875 (La.6/29/01), 791 So.2d 630. Thereafter, defendant filed a motion to recuse Judge Buras. The motion was denied on

July 13, 2001. This court denied defendant's writ. *State v. Brown*, 2001-1418, *unpub.* (La.App. 4 Cir. 8/15/01). On August 9, 2001, defendant filed a motion to stay the hearing on Mr. Singer pending the outcome of the bar examination.

On May 4, 2001, the trial court granted the State's motion to remove Mr. Singer as counsel of record. On May 4, 2001, Clive Stafford Smith enrolled as Mr. Brown's counsel, replacing Mr. Singer as co-counsel.

On September 28, 2001, defendant filed a motion to preclude exclusion of jurors. Prior to trial, Leonard Jordan was held on a material witness bond. On October 2, 2001, Mr. Brown withdrew all former pleas regarding Count Four and entered a plea of "guilty as charged" of the simple robbery of Yul Knighten. The case then proceeded to trial, and the jury, on October 3, 2001, found the defendant guilty as charged of the armed robbery of Wayne Matthews (Count Two) and not guilty of the attempted murder of Leonard Jordan (Count Three). The State entered a *nolle prosequi* with regard to Count One, the attempted first degree murder of Alvin Harris.

On January 18, 2002, the trial court sentenced the defendant to serve 99 years at hard labor without benefit of parole. The defendant objected to the sentence as excessive. On June 21, 2002, the court found the defendant to be a second felony offender and sentenced him to 198 years at hard labor without benefit of parole. The defendant objected to the sentence as excessive. The court granted his motion for appeal.

STATEMENT OF FACT

Wayne Matthews testified that on March 11, 1999, he was the victim of an armed robbery. Mr. Matthews was in his car when the defendant entered. Initially, he believed that the

defendant was joking. He tried talking to the defendant for some ten minutes as he slowly drove his car. Mr. Matthews related that he knew Mr. Brown, as he had previously been introduced to him and that Mr. Brown was frequently at the house of a female friend of his. Mr. Matthews did not see the gun until the defendant was about to exit the car. After Mr. Matthews saw the gun, Mr. Brown asked him for his wallet. Mr. Matthews gave him the wallet and then ran. As he ran he heard a shot and then heard his car being driven off.

Mr. Matthews returned home and called the police. Sometime later, after the police had failed to arrive, Mr. Matthews called again. The two 911 tapes were played for the jury. In the second tape, Mr. Matthews identified his assailant as "Quincy." Mr. Matthews positively identified the defendant in court as the man who had robbed him.

Officer Henry Hollins arrived at the victim's house that night to take a report. Officer Hollins stated that Mr. Matthews identified the perpetrator as someone known to him by the name of Quincy. The officer and Mr. Matthews proceeded to the location of the robbery. Officer Hollins attempted to locate a shell casing but was unsuccessful. While the two were in the area, Mr. Matthews observed his car drive by with two subjects in it. Officer Hollins and Mr. Matthews pursued the vehicle and the two subjects were apprehended. Mr. Matthews stated that neither subject was the perpetrator of the armed robbery.

The day after the robbery, a friend of Mr. Matthews discovered a crack pipe underneath the seat of his car. Mr. Matthews telephoned the police to inform them of his discovery. He related that he was told to throw the pipe away, which he did.

Detective John Duzac testified that he was assigned to conduct the follow up investigation of Mr. Matthews' robbery. He compiled a photographic lineup and presented the photos to Mr. Matthews for identification. Mr. Matthews identified the defendant and signed and dated the back of the photograph.

Sergeant Gus Bethea testified that on February 7, 1999 he assisted in the investigation of a shooting in the Fischer Housing Project. Sergeant Bethea related that three males had been shot and that one had suffered a serious gunshot wound to the throat. Sergeant Bethea related that the other two victims were uncooperative.

Leonard Jordan testified that he was the victim of the shooting which occurred on February 7, 1999. He stated that he had been shot in the jugular and that he had sustained paralysis in the left hand. Mr. Jordan had been at a club that night and had gotten a ride with several people in a van. He recalled getting out of the car in the Fischer Housing Project, but he stated that he could not recall what happened afterwards. Mr. Jordan testified that he had no knowledge of who had shot him that night. He stated that he had blanked out any memory of the shooting from his mind. Mr. Jordan examined a photographic lineup bearing his purported signature on the back of a photograph of the defendant and stated that he was not sure whether that was his signature, although he acknowledged it was similar. He stated that he could not remember whom he had identified. Mr. Jordan acknowledged that he and the defendant were acquaintances.

ERRORS PATENT

A review of the record for errors patent reveals none.

ANALYSIS

Excessive Sentence

Defendant challenges the constitutionality of his multiple offender adjudication and asserts that his sentence is excessive. Citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *United States v. Tighe*, 266 F.3d 1187 (9th Cir.2001), defendant contends that the federal jurisprudence supports the conclusion that a juvenile conviction in which the defendant has not been afforded the right to a trial by jury cannot be used to enhance a defendant's sentence.

The Supreme Court in *Apprendi* stated that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S.Ct. 2348. The Court in *Apprendi* elaborated on the importance of procedural protections being inherent in prior convictions used as sentencing factors to increase statutory penalties:

> There is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing a judge to find the required fact under a lesser standard of proof.

Apprendi, 530 U.S. at 496, 120 S.Ct. 2348.

Apprendi was convicted pursuant to a guilty plea of two counts of second-degree possession of a firearm for an unlawful purpose and one count of third-degree unlawful

possession of an antipersonnel bomb. The two offenses carried a penalty range of between three to ten years. Additionally, however, the State reserved the right to enhance the sentence under the hate crime statute on the ground that the shooting was committed with a biased purpose. The hate crime statute authorized an extended term of between 10 and 20 years. The issue before the Supreme Court was whether the Due Process Clause of the Fourteenth Amendment required that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt. The Court reversed the New Jersey Supreme Court's judgment, which had affirmed the enhancement of the prison sentence within the extended range. The United States Supreme Court held that because Apprendi did not receive a jury trial under the prescribed standard of proof, his sentence violated his constitutional due process rights. In *Apprendi,* however, the Court did not address the issue of prior juvenile adjudications.

As background, Congress has characterized juvenile adjudications as "prior convictions" under the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e)(2)(B), (e)(2)(C). But, whether juvenile convictions can be characterized as "prior convictions" under a due process review as mandated by *Apprendi* is a constitutional question; i.e., the defendant's right not to be deprived of his liberty without due process of law.

In *Tighe, supra*, the U.S. Ninth Circuit Court of Appeals applied *Apprendi's* holding to prior juvenile convictions. The Court in *Apprendi* had concluded that the " 'prior conviction' exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt" and the Ninth Circuit concluded, as a result, that the "prior conviction"

exception does not include nonjury, juvenile adjudications. 266 F.3d at 1194.

In arriving at its conclusion, the Ninth Circuit in *Tighe* reviewed additional United States Supreme Court jurisprudence noting that neither *Apprendi* nor *Almendarez-Torres, infra,* specifically addressed the unique issues distinguishing juvenile convictions from adult convictions. Specifically, in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), the Supreme Court held that the fact of the prior conviction was a sentencing factor, and not a separate element of the crime to be charged in the indictment. *Id.* at 243, 118 S.Ct. 1219. Subsequently, during the next term, the Court in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), considered its holding in *Almendarez-Torres* regarding the use of prior convictions in the context of emerging concern regarding the use of certain facts to increase the defendant's exposure to a statutory penalty not charged in the indictment nor proved beyond a reasonable doubt before a jury. The Court explained the distinction between prior convictions as opposed to other sentencing-enhancing facts as follows:

> One basis for that constitutional distinctiveness [of prior convictions] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense ... a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees.

Jones, 526 U.S. at 249, 119 S.Ct. 1215 (emphasis added).

The Ninth Circuit in *Tighe* focused on the Supreme Court's emphasis in *Apprendi* (quoted above from *Apprendi*, 530 U.S. at 496, 120 S.Ct. 2348), which followed *Jones* in the 2000 term, stressing the necessity for the procedural mechanisms of a jury trial and the standard of beyond a reasonable doubt when increasing the statutory maximum of a sentence. The appellate court concluded:

> Thus, as we read *Jones* and *Apprendi*, the "prior conviction" exception to *Apprendi's* general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. Juvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof, therefore, do not fall within *Apprendi's* "prior conviction" exception.
>
> ...
>
> In sum, we conclude *Apprendi's* narrow "prior conviction" exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt.

Tighe, 266 F.3d at 1194.

Not all federal appellate courts have concluded similarly, however. In *United States v. Smalley*, 294 F.3d 1030 (8th Cir.2002) the identical issue was raised, and the court declined to follow *Tighe*, writing:

> We respectfully disagree with the *Tighe* court's conclusion. The Supreme Court stated in

Apprendi that prior convictions are excluded from the general rule because of the "certainty that procedural safeguards," such as trial by jury and proof beyond a reasonable doubt, undergird them. *Apprendi*, 530 U.S. at 488, 120 S.Ct. 2348. The Court went on to state that "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt," on the one hand, and accepting the validity of findings of facts by judges that are subject to a lesser standard of proof, on the other. *Id.* at 496, 120 S.Ct. 2348. We think that while the Court established what constitutes sufficient procedural safeguards (a right to jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser standard of proof), the Court did not take a position on possibilities that lie in between these two poles. In other words, we think that it is incorrect to assume that it is not only sufficient but necessary that the "fundamental triumvirate of procedural protections," as the Ninth Circuit put it, underly an adjudication before it can qualify for the *Apprendi* exemption.

We do not think, moreover, that *Jones* meant to define the term "prior conviction" for constitutional purposes as a conviction "that has been established through procedures satisfying fair notice, reasonable doubt and jury trial guarantees." 526 U.S. at 249, 119 S.Ct. 1215. We read *Jones* instead to mean that if prior

convictions result from proceedings outfitted with these safeguards, then they can constitutionally be used to increase the penalty for a crime without those convictions being submitted and proved to a jury. Our confidence in this reading is bolstered by the fact that in explaining the exception for prior convictions, the *Apprendi* court itself talks about only the right to a jury trial and proof beyond a reasonable doubt. We think it notable, moreover, that *Apprendi* does not even refer to the language in *Jones*, quoted above, upon which the *Tighe* court based its conclusion.

In any case, we conclude that the question of whether juvenile adjudications should be exempt from *Apprendi's* general rule should not turn on the narrow parsing of words, but on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption. We believe that they are.

For starters, juvenile defendants have the right to notice, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. See *In re Winship*, 397 U.S. 358, 368, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A judge in a juvenile proceeding, moreover, must find guilt beyond a reasonable doubt before he or she can convict. See id. We think that these safeguards are more than sufficient to ensure the reliability that *Apprendi* requires. This conclusion finds at least some support in those cases, in both our circuit

> and the Ninth Circuit, that hold that juvenile sentences may be used to enhance a defendant's sentence within a prescribed statutory range. See *United States v. Early*, 77 F.3d 242, 244-45 (8th Cir.1996) (per curiam); *United States v. Williams*, 891 F.2d 212, 214-15 (9th Cir.1989), *cert. denied*, 494 U.S. 1037, 110 S.Ct. 1496, 108 L.Ed.2d 631 (1990). Finally, while we recognize that a jury does not have a role in trials for juvenile offenses, we do not think that this fact undermines the reliability of such adjudications in any significant way because we think that the use of a jury in the juvenile context would "not strengthen greatly, if at all, the fact-finding function" and is not constitutionally required. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 547, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (plurality opinion).
>
> We therefore conclude that juvenile adjudications can rightly be characterized as "prior convictions" for *Apprendi* purposes, and that the district court did not err in increasing Mr. Smalley's sentence based on his prior juvenile adjudications.

Smalley, 294 F.3d at 1030-32.

Although federal jurisprudence is merely persuasive, the underlying rationale is instructive. The Louisiana Supreme Court has yet to deal squarely with the issue of whether the use of juvenile adjudications to enhance a statutory penalty is constitutionally permissible. Recently, however, the Louisiana Supreme Court addressed the question of whether the juvenile should be allowed a trial by jury and other similar rights. See

State in the Interest of D.J., 01-KA-2149 (La.5/14/02), 817 So.2d 26. Our supreme court concluded that such rights need not be permitted in juvenile proceedings, but strongly hinted that this difference in adjudication procedures might require the exclusion of such adjudications from later enhancement proceedings:

> In *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) and *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), the Supreme Court prohibited the use of prior convictions that were entered without the advice of counsel to enhance later sentences. In a related vein, some commentators suggest that the practice of using juvenile convictions obtained without the option to be tried by a jury to enhance adult sentences renders the juvenile system unconstitutional. See e.g., Sara E. Kropf, Note, *Overturning McKeiver v. Pennsylvania: The Unconstitutionality of Using Prior Convictions to Enhance Adult Sentences Under the Sentencing Guidelines*, 87 Geo. L.J. 2149 (1999); David Dormont, Note, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 Minn. L.Rev. 1769, 1793-94 (1991).

Id. at p. 4, n. 6; 817 So.2d at 37, n. 6.

We conclude that the rationale articulated by the Ninth Circuit in *Tighe*, as opposed to the Eighth Circuit's converse reasoning in Smalley, is more in line with the minimal guidance provided thus far by our highest court in State in the Interest of D.J., supra. Therefore, we hold that prior juvenile

adjudications that resulted absent a jury trial are constitutionally inadequate under the *Apprendi* exception for purposes of subsequent sentence enhancement.

In the instant case, the juvenile matter was heard by a judge, not a jury. The juvenile court, however, did employ the requisite beyond-a-reasonable-doubt standard. The defense asserts that the circumstances of that conviction (for attempted second degree murder) demonstrate the problem with considering a juvenile conviction as an *Apprendi* exception. Following is Quincy Brown's statement when he was adjudicated at the age of fourteen:

> I was at Diana and Verret St. across from the church when Lowdown [Ron Brown] walked up. He was talking to [a] boy named Leroy in a car and he had seen [me] and he asked if I had seen Syble. I told him that the last time I had seen her was around the corner. He said come on and let's go walk around there, I have to ask her something. He said for me to go on around the corner and tell her to meet him at the corner. I went around by Belleville St. and found her and told her that Lowdown wanted to tell her something. She ask me where he was at and I told her that he was around the corner. She said where at and I told her that he was at the side street by Socrates and Belleville St. She told me to walk her to the corner so I walked to the corner and then I went back to where I was. I heard shooting from Belleville and Socrates St. I ran back around the re and asked Johnny and Bebe what happened. They didn't know so I went to the corner where everybody was standing. I saw Syble stumbling around and I asked her

> what had happened. She told me to leave her alone. And she was falling and I picked her [up] and her face was bloody. She told me ["]Lowdown shot me." I walked her to her sister in law house. The man there wouldn't call an ambulance. I walked her back to Diana and Vallette St. and I told Damien to go call an ambulance and I went to wash the blood off my hand.

Defense argues, correctly, that the above statement from the defendant at the age of 14 indicates that there was no evidence that Quincy Brown participated in the crime resulting in the girl's death. In fact, the statement indicates instead that Quincy Brown tried to help the victim. Yet, Quincy Brown was adjudicated guilty of attempted second degree murder.

Paradoxically, Lowdown Brown (no relation to Quincy Brown) was tried before a jury because he was an adult at the time of the crime and the jury acquitted Lowdown. Yet Quincy Brown, with no evidence of being an accessory to anyone, was adjudicated as guilty by a judge and sent to juvenile prison. To use such a defective juvenile adjudication to constitute a "prior conviction" for purposes of the *Apprendi* exception, and allow such prior conviction to be used to enhance the statutory penalty for Quincy Brown's instant offense is constitutionally improper.

We conclude on this issue of excessive sentence that the trial court erred in enhancing the sentence of the defendant on the basis of the prior juvenile conviction. Accordingly, we reverse and remand for re-sentencing consistent with this opinion.

Validity of the Conviction

Defense counsel asserted numerous non-constitutional assignments of error, which challenge the validity of the conviction and summarizes in brief that even if none of the assignments constitute sufficient grounds for reversal, taken together the various alleged errors would serve to be a cumulative error warranting reversal. We disagree. Reviewing the various alleged trial court errors, we find the only allegations with merit to be the following, and the two improper admissions constituted harmless error because the evidence was sufficient to convict the defendant irrespective of these two.

The trial court erred in admitting the 911 tape and arrest warrant, both of which were used for the truth of the matter asserted and thereby constituted hearsay. This evidentiary error, however, was harmless error because there existed sufficient additional evidence that Quincy Brown committed the crime for which he was charged. If hearsay testimony is improperly admitted into evidence, it may be considered harmless error if the reviewing court determines that it did not contribute to the verdict. *State v. Hearold*, 603 So.2d 731, 739 (La.1992). All the information included on the search warrant was received by the court through competent evidence. Thus, the arrest warrant, if indeed it constituted hearsay, was merely cumulative and non-prejudicial.

Similarly, the recording of the 911 emergency calls were also cumulative. Mr. Matthews, the victim, and Officer Hollins both testified as to the contents of the tape recording. Also, there was full opportunity for cross-examination. Therefore, the admission of the tapes was harmless error.

CONCLUSION

For the foregoing reasons, we affirm the convictions, but reverse the sentence as constitutionally excessive. We remand the matter to the trial court for re-sentencing consistent with this opinion.

CONVICTION AFFIRMED; SENTENCE REVERSED; REMANDED.

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[1] The defendant ultimately pled guilty to the reduced charge of manslaughter on January 28, 2002. See *State v. Brown*, 2001-2463 (La. 4/12/02) __ So. 2d __, 2002 WL 576176.